RECORD
AND
BRIEFS

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No. 16-498

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the
District of Columbia Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The Gun Lake Act Violates Separation of Powers Principles Regardless of Whether It is Properly Characterized as a Jurisdictional Statute 2

II. The Court Must Guard Against Separation of Powers Violations, and this Case is an Ideal Vehicle to Clarify When Congress Has Infringed the Judicial Power 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 2, 3

Baker v. Carr, 369 U.S. 186 (1962) 8

Bank Markazi v. Peterson,
136 S.Ct. 1310 (2016) 7, 8

Bond v. United States, 564 U.S. 211 (2011)..... 10

Carlsbad Technology, Inc. v. HIF Bio, Inc.,
556 U.S. 635 (2009) 3

Chicago & Southern Air Lines, Inc. v.
Waterman S.S. Corp., 333 U.S. 103 (1948) 6

City of Arlington v. FCC,
133 S.Ct. 1863 (2013) 4, 9

Department of Transp. v. Association of
American Railroads, 135 S.Ct. 1225
(2015) 10

Fair Assessment in Real Estate Assoc., Inc. v.
McNary, 454 U.S. 100 (1981)..... 4

Freytag v. Commissioner of Internal Revenue,
501 U.S. 868 (1991) 1, 8

Hayburn's Case, 2 Dall. 409 (1792)..... 5, 6

Keene Corp. v. United States,
508 U.S. 200 (1993) 3

Lauf v. E.G. Shinner & Co.,
303 U.S. 323 (1938) 4

Loving v. United States,
517 U.S. 748 (1996) 6, 8

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,
132 S.Ct. 2199 (2012) (*"Patchak I"*) .....*passim*

Miller v. French, 530 U.S. 327 (2000) 8

Mistretta v. United States,
488 U.S. 361 (1989) 8-9

Morrison v. Olson, 487 U.S. 654 (1988)..... 1, 9

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) 9

NLRB v. Noel Canning,
134 S.Ct. 2550 (2014) 9, 10, 11, 12

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) 7

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 1, 5

Public Citizen v. Department of Justice,
491 U.S. 440 (1989) 9

Reid v. Covert, 354 U.S. 1 (1957) 10

Robertson v. Seattle Audubon Society,
503 U.S. 429 (1992) 8, 9

SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, --- S.Ct. ----
(2017) 4, 9

Seattle Audubon Society v. Robertson,
914 F.2d 1311 (9th Cir. 1990) 9

Sebelius v. Auburn Regional Medical Center,
135 S.Ct. 817 (2013) 2

Stern v. Marshall, 564 U.S. 462 (2011) 3, 10

United States v. Klein,
80 U.S. (13 Wall.) 128 (1871) 4-5, 7, 9

United States v. O'Grady, 89 U.S. 641 (1874) 5

United States v. Wells, 519 U.S. 482 (1997) 2

CONSTITUTIONAL PROVISIONS

U.S. CONST. Art. III ..... *passim*

U.S. CONST. amend. V 11

STATUTES, RULES AND LEGISLATIVE MATERIALS

Pub. L. No. 113–179, 128 Stat. 1913 (the Gun Lake Act) ..... *passim*

SUP. CT. R. 10 2

H. Rep. No. 113-590 (2014) 1, 3, 7

S. Hrg. 113-509 (2014) 6-7

S. Rep. No. 113-194 (2014) 3, 7

INTRODUCTION

"Time and again" the Court has "reaffirmed the importance in our constitutional scheme of the separation of government powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). And "[t]he leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 870 (1991).

Section 2(b) of the Gun Lake Act upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995). It directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending any generally applicable statute. And it did so in order to overcome this Court's decision in *Patchak I*, and "void" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, after this Court expressly held that it "may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. at 2199, 2203 (2012) (*"Patchak I"*).

Respondents' opposition briefs[1] defend the Gun Lake Act, but fail to dispute that if Congress is permitted to direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or

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[1] In this Reply, the Brief for the Federal Respondents in Opposition is cited as "FR Br." and the Intervenor-Respondent Tribe's Opposition is cited as "Tribe Br."

procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees.

While Petitioner contends the Gun Lake Act should have been declared unconstitutional based on this Court's existing decisional law, the statute and the circumstances giving rise to it unquestionably test the limits of Congress's authority to act without intruding upon the judicial power. This case presents an important opportunity for the Court to clarify the boundaries of that authority. *See* SUP. CT. R. 10(c).

I. The Gun Lake Act Violates Separation of Powers Principles Regardless of Whether It is Properly Characterized as a Jurisdictional Statute

Respondents rely heavily on their contention that the Gun Lake Act is jurisdictional. While the statute violates separation of powers principles regardless of whether it is properly deemed jurisdictional, Respondents' contention is incorrect.

The Court has adopted a "bright line" test treating statutory limitations as nonjuridictional unless Congress has "clearly stated" otherwise. *Sebelius v. Auburn Regional Medical Center*, 135 S.Ct. 817, 824 (2013); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). This test was adopted before the Gun Lake Act, and the Court generally "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997).

Rather than address the Court's "bright line" test, Respondents ignore it—failing to even mention

Arbaugh or subsequent cases applying its holding.

The Gun Lake Act does not state (clearly or otherwise) that it is jurisdictional. To the contrary, the word "jurisdiction" does not appear anywhere in its title, headings or text. *Cf. Stern v. Marshall*, 564 U.S. 462, 479 (2011) ("we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such").[2]

Respondents also ignore the Gun Lake Act's legislative history which corroborates the statute is not jurisdictional. The House and Senate Reports each state the statute would not make any "changes in existing law." H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014). The sections of the U.S. Code conferring subject matter jurisdiction over Petitioner's case were unaltered by the Gun Lake Act. *Cf. Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (subject matter jurisdiction concerns "the court's authority to hear a given *type* of case") (emphasis added).

But Respondents' argument about jurisdiction fails to address a more fundamental point: ***Section 2(b) of the Gun Lake Act would violate the***

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[2] Although Federal Respondents rely on *Keene Corp. v. United States*, 508 U.S. 200 (1993), the statute at issue there divested the Court of Federal Claims of jurisdiction using language that does not require mind-reading or imagination, stating the court "shall not have jurisdiction" over certain claims. *Id.* at 207. *Keene* reflects that Congress knows how to "clearly state" a statute is jurisdictional—which it did not do with the Gun Lake Act. And, as the Court noted in *Keene*, it has a "duty to refrain from reading a phrase into a statute when Congress has left it out." *Id.* at 208.

separation of powers even if the statute was ostensibly "jurisdictional." Congress's broad authority to define the jurisdiction of the federal courts must be exercised consistent with all of the Constitution's requirements—including its separation of powers principles. *See City of Arlington v. FCC*, 133 S.Ct. 1863, 1868 (2013) ("Congress has the power *(within limits)* to tell the courts what *classes* of cases they may decide.") (emphasis added); *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100, 125 (1981) ("Subject of course to constitutional constraints, the jurisdiction of the lower federal courts is subject to the plenary control of Congress.") (Brennan, J., concurring). No case cited by Respondents establishes otherwise.[3] Nor have Respondents identified any decision from this Court holding that Congress's general power to alter the jurisdiction of the federal courts precludes finding a particular jurisdiction-stripping statute violates separation of powers principles. And *United States v. Klein*, 80

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[3] The cases cited by Respondents do not establish that the Gun Lake Act "does not raise any constitutional issue under Article III." FR Br. 7-8; *see also* Tribe Br. 9 (Act "does not run contrary" to Article III). None of those cases concerned or addressed the scope of Congress's power to eliminate jurisdiction when doing so would violate another constitutional provision. Moreover, most of the language they rely on appears in dicta, which "settles nothing." *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, --- S.Ct. ---- (2017). And Respondents rely on *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938), but overlook that in *City of Arlington* the Court cited *Lauf* after noting Congress's authority over jurisdiction exists "within limits." *City of Arlington*, 133 S.Ct. at 1868.

U.S. (13 Wall.) 128 (1871), directly refutes any such claim. There, the Court held that Congress had invaded the judicial power with a statute providing the Court "would have no further jurisdiction of the cause" and "shall dismiss the same for want of jurisdiction." *Id.* at 143. As *Klein* makes clear, an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction still constitutes a separation of powers violation.[4]

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers," *Plaut*, 514 U.S. at 219, and deliberatively and decisively rejected legislative review of judicial decisions. This Court accordingly recognized long ago that "Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. 641, 648 (1874); *see also Hayburn's Case*, 2 Dall. 409, 413 (1792); *Plaut*, 514 U.S. at 218 (*Hayburn's Case* "stands for the principle

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[4] While conceding that *Klein* concerned an express congressional attempt to withdraw the Court's jurisdiction, Respondents downplay *Klein's* relevance to the Gun Lake Act on the ground that *Klein* involved not only Congress's exercise of judicial power, but also implicated the relationship between Congress and the President. *See* Tribe Br. 10-11; FR Br. 10. But *Klein* cannot plausibly be read to avoid the Court's clear holding that Congress had "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147; *see also* Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioner at 7 (cautioning against reading *Klein* "simply as a case about the pardon power").

that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of the Government.").

When Congress directed the federal courts to "promptly dismiss" Petitioner's pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving v. United States*, 517 U.S. 748, 757 (1996). Whatever latitude Congress ordinarily enjoys when legislating about federal court jurisdiction does not permit it to exercise judicial power while impeding the judiciary from carrying out its own constitutionally-assigned responsibilities.[5] And it is difficult to imagine a

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[5] Respondents claim the Gun Lake Act's "purpose" was to "provide certainty to the legal status of the [Bradley Property]," with Federal Respondents insisting that "[e]conomic certainty and the finality of governmental decisions are legitimate governmental purposes." FR Br. 17; Tribe Br. 6. While the Gun Lake Act certainly sought to settle "the legal status" of the property, its purpose was also to overcome "a U.S. Supreme Court opinion [*Patchak I*] that ha[d] allowed one individual to challenge the authority of the Secretary of Interior to take land into trust," and to "end" Petitioner's lawsuit. *Hearing on S.*

more direct invasion of the judicial power than occurred here. If Congress had the power to intervene and dictate the outcome of Petitioner's pending lawsuit by enacting the Gun Lake Act, then it has the same, seemingly unlimited, power with respect to any pending case.

Inclusion of Section 2(a) in the Gun Lake Act did not cure the profound separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced *new*, unsettled legal issues pertinent to Petitioner's APA case. *See* Pet. 23. However, with Section 2(b), Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts. *Cf. Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1323 (2016) (expressing "no doubt" Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it."); *Klein*, 80 U.S. (13 Wall.) at 146-47 (explaining "we do not at all question what was decided in" *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), where "the court was left to apply its ordinary rules to the new circumstances created by the act"); *see also* Brief of

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1603 Before the S. Comm. on Indian Affairs, S. Hrg. 113-509 at 55 (2014) (statement of David K. Sprague); *see also id.* at 9 (legislation was "to address *Patchak [I].*") (statement of Kevin Washburn); Pet. App. 36a (district court finding Congress had "a clear intent to moot this litigation"). The Gun Lake Act provided "certainty" only by "extinguish[ing] all rights to legal actions relating to the trust lands," S. Rep. No. 113-194, at 2-3 (2014), and "void[ing]" Petitioner's lawsuit. H. Rep. No. 113-590, at 2 (2014).

Federal Courts Scholars as Amici Curiae in Support of Petitioner at 18 ("even assuming *arguendo* that section 2(a) *did* change substantive law in Petitioner's case, for such a maneuver to be constitutional, it must follow that the change would be implemented by the *courts*").

II. The Court Must Guard Against Separation of Powers Violations, and this Case is an Ideal Vehicle to Clarify When Congress Has Infringed the Judicial Power

The Court should reject Federal Respondents' suggestion that the Petition be denied because "the Gun Lake Act is a statute of limited reach and does not present a question of national importance." FR Br. 14.

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Consistent with this responsibility, the Court frequently grants review when a serious separation of powers issue is presented—even though in many instances the Court ultimately concludes no violation has occurred. *See, e.g., Bank Markazi*, 136 S.Ct. 1310; *Miller v. French*, 530 U.S. 327 (2000); *Loving v. United States*, 517 U.S. 748 (1996); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *Freytag*, 501 U.S. 868; *Mistretta v. United States*,

488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).[6]

The invitation to look past a serious separation of powers issue because the offending statute has "limited reach" is at odds with this Court's recognition that "policing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of [its] most vital functions.'" *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Public Citizen v. Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment)). It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington*, 133 S.Ct. at 1886 (Roberts, C.J., dissenting); *cf. SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, --- S.Ct. ---- (2017) (explaining relevance of "separation-of-powers principles" to the Court's conclusion that "applying laches within a limitations

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[6] Recognizing the importance of maintaining the separation of powers, the Court has granted review in numerous cases without the presence of conflicting lower court decisions. *See* Pet. 15 n.6 (citing cases). Respondents do not suggest the Petition should be denied due to an absence of conflicting lower court decisions. Nor do Federal Respondents appear to dispute (FR Br. 13-14) that the D.C. Circuit's decision below is in tension with the Ninth Circuit's decision in *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), which held that a statutory provision directing decisions in pending cases without amending any law was unconstitutional under *Klein*, or that the Ninth Circuit has continued to rely on its reading of *Klein* after this Court's decision in *Robertson*, 503 U.S. 429. *See* Pet. 15-16.

period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power"). The Court "may not—without imperiling the delicate balance of our constitutional system—forego [its] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Department of Transp. v. Association of American Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring).

Federal Respondents fail to recognize that "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'" *Stern*, 564 U.S. at 502-03 (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 503.

Federal Respondents' suggestion that the Gun Lake Act's "limited reach" warrants denial of the Petition also inappropriately disregards the critical role structural separation of powers principles play in safeguarding individual rights. *See Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well."); *Noel Canning*, 134 S.Ct. at 2593 (It is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t]

individual liberty.'") (Scalia, J., concurring) (quoting *Bond*, 564 U.S. at 223).

The protection of individual liberty advanced by separation of powers principles would be substantially undermined if the Court embraced the notion that only violations affecting large numbers of individuals warrant attention.[7]

CONCLUSION

"It is not every day that [the Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. [The Court] should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles

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[7] The Petition explained that Section 2(b) deprived Mr. Patchak of his right to equal protection guaranteed by the Fifth Amendment's Due Process Clause. Pet. 26-27. Respondents contend that argument was not "pressed or passed upon below." FP Br. 17; Tribe Br. 17-19. While the language of equal protection was not explicitly addressed below, it is undisputed that Petitioner raised a Fifth Amendment challenge to the Gun Lake Act in both the district court and court of appeals (Pet. App. 14-16, 45-46)—and that the equal protection issue addressed in the Petition is rooted in the Fifth Amendment. Moreover, the equal protection argument addressed in the Petition is closely related to the other separation of powers issues presented given the role separation of powers plays in protecting individual liberty. The Court unquestionably has authority to address the equal protection argument if the Petition is granted. However, if the Court elects to address only the core separation of powers issues raised, the Petition could be granted with respect to Question 1 only. *See* Pet. at i.

over the politics of the moment." *Noel Canning*, 134 S.Ct. at 2617 (Scalia, J., concurring).

The Petition for a Writ of Certiorari should be granted.

April 2017

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